



4000-01-U

DEPARTMENT OF EDUCATION

Arbitration Panel Decision under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration decision.

SUMMARY: The Department of Education (Department) gives notice that, on March 17, 2011, an arbitration panel (the Panel) rendered a decision in Bernard Werwie, Jr. v. Pennsylvania Office of Vocational Rehabilitation (Case no. R-S/07-16).

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the full text of the Panel decision from Donald Brinson, U.S. Department of Education, 400 Maryland Avenue, SW., room 5045, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7310. If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll-free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under FOR FURTHER INFORMATION CONTACT.

SUPPLEMENTARY INFORMATION: The Panel was convened by the Department under the Randolph-Sheppard Act (Act), 20 U.S.C.

107d-1(a), after receiving a complaint from the complainant, Bernard Werwie, Jr., a licensed blind operator of a vending facility in Luzerne County, Pennsylvania. Under section 107d-2(c) of the Act, the Secretary publishes in the Federal Register a synopsis of each Panel decision affecting the administration of vending facilities on Federal and other property.

Background

The complainant, Bernard Werwie, Jr., was a licensed blind operator of a vending facility in Luzerne County, Pennsylvania. His dispute with the respondent, the Commonwealth of Pennsylvania's Office of Vocational Rehabilitation (PA OVR), arose out of the termination of his participation in the Business Enterprises Program by the PA OVR effective December 31, 2006.

Pursuant to the Act, Mr. Werwie sought a hearing of his claims against the PA OVR. On July 7, 2008, a hearing officer dismissed his appeal and denied his request for damages and attorney's fees. The PA OVR adopted the hearing officer's decision as its final agency action.

Mr. Werwie then requested the convening of the Panel. The Panel chair moved to schedule a hearing for that summer. There were no acceptable hearing dates available

in the summer, so the Panel chair circulated a list of proposed dates in late 2009.

The hearing was not held in 2009 because, in July, Mr. Werwie discharged the attorneys he had engaged to handle the case. The Panel granted him until January 2010 to find new counsel.

Despite being granted an extension to name a new representative by January of 2010, Mr. Werwie did not respond until February 25. In his response, he indicated that he was still looking for new counsel and asked that the case be held in abeyance until September 2010 or until further notice. The PA OVR objected to this request for delay, and, on March 29, 2010, the Panel gave Mr. Werwie until May 3, 2010, to find new counsel.

Mr. Werwie never responded with the name of a new representative as requested by that deadline. Accordingly, the Panel chair informed him that, if he intended to proceed with his case against the PA OVR, he had to respond by June 10, 2010.

On July 1, 2010, the PA OVR filed a motion to dismiss Mr. Werwie's claims for failure to prosecute. Counsel for the PA OVR served Mr. Werwie a copy of this motion and supporting brief by sending them by First Class Mail to his Fredericksburg, Virginia, address.

On July 18, 2010, the RSA informed the Panel chair of an email received from Mr. Werwie asking about the status of his case. In it, he alleged that he had heard nothing about the case since early March. This message was from email and postal mail addresses different from those he had used in his prior correspondence. The New Cumberland, Pennsylvania, address that he listed in his July 18 communication was identified as his father's address.

The Panel responded to Mr. Werwie on August 9, 2010. It asked him for confirmation that he was ready to proceed with the case and instructed him to inform it of the name and contact information of his new counsel on or before August 29, 2010. The Panel indicated that, if it could not schedule a hearing, it would then proceed with the PA OVR's motion to dismiss the complaint.

On August 18, Mr. Werwie notified the Panel that his representatives were the same attorneys whom he fired on July 22, 2009. The Panel then asked the attorneys to confirm that they represented Mr. Werwie and proposed a conference call to be held on September 2, 2010.

On August 30, one of the attorneys, Mr. Leiterman, responded by email that Mr. Werwie asked him and his colleague to represent him in this case. Mr. Leiterman continued that they had "agreed in principle," and they

expected the letter of representation to be signed in the next week. However, in the two weeks that followed, the Panel did not hear from either attorney.

On September 17, 2010, the Panel sent Mr. Werwie a letter indicating that it would grant the PA OVR's motion to dismiss if Mr. Werwie did not respond by November 1, 2010. Neither Mr. Werwie nor his attorneys responded to the motion to dismiss. On March 17, 2011, the Panel granted the PA OVR's motion to dismiss for failure to prosecute.

Synopsis of the Panel Decision

The Panel reviewed the statutory language of the Act and the RSA's implementing regulations, policies, and procedures. The Panel concluded that it has the authority to grant a motion to dismiss in this case without first conducting a hearing. It also concluded that there were unusual circumstances present in this case, notably delays in the process due to the change of Mr. Werwie's lawyers. The Panel repeatedly warned Mr. Werwie that his failure to move the case forward could result in dismissal and noted that he chose not to file a response at all although he was given ample time to do so. Because of these circumstances, the Panel decided that granting the PA OVR's motion to

dismiss for Mr. Werwie's failure to prosecute was an appropriate exercise of its discretion.

The views and opinions expressed by the Panel do not necessarily represent the views and opinions of the Department.

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Dated: April 11, 2017.

Ruth E. Ryder,
Deputy Director, Office of Special
Education Programs, delegated the
duties of the Assistant Secretary
for Special Education and
Rehabilitative Services.

[FR Doc. 2017-07727 Filed: 4/14/2017 8:45 am; Publication Date: 4/17/2017]